APPENDIX A — OPINION FOR THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED FEBRUARY 10, 1998

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 96-1483

Z.J. GIFTS D-2 L.L.C., doing business as CHRISTIE'S, an Oklahoma limited partnership,

Plaintiff-Counter-Defendant-Appellee,

v.

CITY OF AURORA, and Incorporated Municipality,

Defendant-Counter-Claimant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 93-M-2310)

Charles H. Richardson (Teresa Kinney of the Office of the Aurora City Attorney, Aurora, Colorado, and Barry Arrington of the Law Offices of Barry K. Arrington, P.C., Denver, Colorado, with him on the briefs), Office of the Aurora City Attorney, Aurora, Colorado, for Defendant-Counter-Claimant-Appellant.

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Michael Gross (Arthur M. Schwartz with him on the briefs), Arthur M. Schwartz, P.C., Denver, Colorado, for Plaintiff-Counter-Defendant-Appellee.

Before ANDERSON, KELLY, and HENRY, Circuit Judges.

KELLY, Circuit Judge.

Defendant/Counterclaimant-appellant, the City of Aurora, appeals from the district court's grant of summary judgment in favor of Plaintiff/Counterdefendant-appellee Z.J. Gifts. The district court invalidated a city zoning regulation requiring sexually oriented businesses to locate in industrially-zoned areas and enjoined its enforcement against Z.J. Gifts. Interpreting federal constitutional law, the district court held that the regulation was a content-based restriction of speech as applied to Z.J. Gifts' retail business which sold and leased adult videos and magazines for off-site viewing only. *See Z.J. Gifts v. City of Aurora,* 932 F. Supp. 1256, 1257-60 (D. Colo. 1996). We exercise jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1), reverse, and remand for proceedings consistent with this opinion.

Background

In early 1993, Aurora city officials became concerned that the city lacked regulatory and enforcement mechanisms to minimize negative effects resulting from sexually-oriented businesses locating within city limits. In response, the city attorney's office presented a draft ordinance regulating the operation and location of sexually-oriented businesses to the city council in September 1993.

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In October 1993, Z.J. Gifts, a limited partnership, leased space in the Granada Park Shopping Center, located in a commercially-zoned area, and prepared the space for retail sales of adult novelties, magazines, and videos. After applying for sales tax and business licenses, the shop, named "Christie's," opened for business on October 30, 1994, and has since been in continual operation. Unlike other adult uses, such as adult theaters, peep shows, and nude dance clubs, Christie's provides no on-site adult entertainment. The shop instead sells and rents adult materials to customers for viewing off premises.

After review of a thorough legislative record, deliberation and public hearings, the Aurora City Council enacted an ordinance regulating all sexually-oriented businesses, including adult bookstores, novelty shops and video stores, on December 13, 1994. The ordinance established comprehensive licensing, operating, and inspection requirements for sexually oriented businesses located within city limits. The ordinance further required sexually oriented businesses to locate in industrially-zoned areas, and prohibited them from locating within 1500 feet of churches, schools, residential districts or dwellings, public parks, and other sexually oriented businesses. *See* Aurora Mun. Code § 32.5-52; I Aplt. App. at 43-44.

Z.J. Gifts fled suit against the city, challenging the constitutionality of several provisions of the ordinance, including the zoning requirements. The city counterclaimed to enjoin Z.J. Gifts from operating Christie's in violation of the ordinance. The city also sought a declaration that Christie's operates in violation of the zoning provision of the ordinance and requested a permanent injunction barring Christie's from operating in that location. The parties filed cross-motions for summary judgment, and the district court granted Z.J. Gifts'

motion. The district court held that as applied, the zoning provision requiring Christie's to locate within an industrially zoned area unconstitutionally infringed Z.J. Gifts' free speech interest. Z.J. Gifts' remaining claims for relief were dismissed as moot. The city appealed.

Discussion

Where First Amendment interests are implicated, this court is obligated to make an independent examination of the record in its entirety to ensure the challenged regulation does not improperly limit expressive interests. *See Revo v. Disciplinary Bd. of the Supreme Court* 106 F.3d 929-932 (10th Cir.), *cert. denied,* 117 S. Ct. 2515 (1997). Thus, we review constitutional facts and conclusions of law de novo. *See id.* Similarly, we review a district court's grant of summary judgment de novo, using the standard provided in Fed. R. Civ. P. 56(c). *See Kaul v. Stephan,* 83 F.3d 1208, 1212 (10th Cir. 1996). Just as we may affirm a grant of summary judgment on any ground adequately supported by the record, we may direct that judgment be entered in favor of any moving party if the record adequately supports it. *See Dickeson v. Quarberg,* 844 F.2d 1435, 1444-45 n.8 (10th Cir. 1988).

We recognize that governmental limitations which limit expressive interests strike "[a]t the heart of the First Amendment." *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 641 (1994). We are also aware that First Amendment doctrine must be informed by the complex tangle of social, political, and cultural interests in limiting speech as well as protecting it, for the tension between individual rights and community needs is at the core of every First Amendment issue. This tension is most pronounced in cases like this one, where the speech

regulated is unpopular and the community's interest in regulating it significant. We undertake review of the Aurora zoning provision against this backdrop of competing community and individual interests.

As an initial matter, the district court reviewed Aurora's ordinance as a content-based regulation of speech. *See Z.J. Gifts,* 932 F. Supp. at 1260. Recognizing that most ordinances regulating sexually oriented businesses are considered content-neutral, the court rejected that conclusion because it believed "none of the material relied on by the city council shows that the business of Christie's bears any relationship to [harmful secondary] effects." *Id.* at 1258. Though we recognize that "[d]eciding whether a . . . regulation is content-based or content-neutral is not always a simple task," *Turner,* 512 U.S. at 642, the district court's emphasis on the relationship between the materials used to justify the ordinance and the nature of Z.J. Gifts' retail business is misplaced.

Content-based restrictions on speech, those which "suppress, disadvantage, or impose differential burdens upon speech because of its content," *id.,* are subject to "the most exacting scrutiny." *Id.* Conversely, content-neutral regulations "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue" because they are unrelated to the content of speech. *Id.* Content-neutral regulations are accordingly subject to intermediate scrutiny. *See Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984). In determining whether a regulation is content-neutral, "[t]he government's purpose [in enacting the regulation] is the controlling consideration." *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). If the regulation "serves purposes unrelated to the content of expression" it is considered neutral,

"even if it has an incidental effect on some speakers or messages but not others." *See id.* (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986)).

The Supreme Court has long held that city zoning ordinances which place limits on the location of adult uses are valid exercises of the city's police power. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62-63 (1976). Though such regulations treat adult uses differently other uses based on their sexually explicit nature, they are "designed to prevent crime, . . . maintain property values, . . . and preserve . . . the quality of urban life." *Renton*, 475 U.S. at 48 (quotation marks omitted). Because ordinances zoning adult uses are intended to curb the secondary effects of those uses on surrounding communities and burden free speech interests only incidentally, they are generally reviewed as content-neutral regulations subject to a less stringent standard of review. *See id*, at 48-50.

The record clearly establishes Aurora's purpose in enacting the ordinance: to regulate the harmful secondary effects of sexually oriented businesses. The preamble to the ordinance indicated the city's intent to "protect [ ] [its] citizens from increased crime; preserve [ ] the quality of life, property values, and character of neighborhoods and businesses; deter[ ] the spread of urban blight; and protect [ ] against the spread of sexually transmitted diseases. . . ." I Aplt. App. at 126; *see Renton*, 475 U.S. at 49. Further, even if Z.J. Gifts could support its allegation that "[m]embers of the Aurora City Council [] openly avowed . . . that the ordinance was enacted for the express purpose of closing Plaintiff's business[,]" Aplee. Br. at 4, " 'alleged illicit . . . motive[s]' " hidden in legislators' comments will not support a determination that a restriction is content-based. *Renton*, 475 U.S. at 48. (quoting *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968)).

Most importantly, we disagree that the ordinance's content-neutrality is affected by the city's reliance on studies utilizing slightly dissimilar businesses. As the Eighth Circuit noted in a case remarkably similar to this one, examining the similarity of the businesses utilized in the studies relied on to the businesses regulated in determining an ordinance's content-neutrality "confuses distinct aspects of the *City of Renton* test." *ILQ Investments, Inc. v. City of Rochester,* 25 F.3d 1413, 1416 (8th Cir.), *cert. denied,* 513 U.S. 1017 (1994). The district court's inquiry may well be relevant in determining whether the ordinance is "narrowly tailored to regulate only those adult uses shown to have caused adverse secondary effects" under *Renton. Id.* at 1417. But where, as here, the studies relied upon adequately support the city's *purpose* in enacting the ordinance — regulating the harmful secondary effects associated with sexually oriented businesses — the government's regulation of such businesses is "*justified* without reference to the content of the regulated speech." Rock Against Racism, 491 U.S. at 791 (emphasis in original). Thus, we are satisfied that differences in the mode of delivery of sexually oriented materials are constitutionally insignificant for purposes of determining an ordinance's content-neutrality. *See Renton*, 475 U.S. at 49 ("[W]ith respect to businesses that *purvey* sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are . . . 'content-neutral.' " (emphasis added). The city need only rely upon "evidence . . . *reasonably* believed to be relevant to the problem that the city addresses." *Id.* at 51-52 (emphasis added). If the city can show that the ordinance affects "that category of [businesses] shown to produce the unwanted secondary effects," *id.* at 52, the ordinance will stand. So long as cities do not use "the power to zone as a pretext for suppressing expresion," *id.*, at 54 (citing *Young,* 427 U.S. at 84 (Powell, J. concurring)), attempts to

regulate the adverse effects associated with sexually oriented businesses are properly classified as content-neutral.

Given the uncontroverted sexual nature of Z.J. Gifts' business, we are convinced the city has met its burden. The record indicates several of the studies examine the effects of adult businesses or sexually oriented businesses generally. Significantly, at least three of these studies examine the effects of adult bookstores on surrounding communities.[1] Although Z.J. Gifts argues and attempts to prove that all other adult bookstores provide some form of on-premises viewing of sexually explicit materials, *see* Aplee. Br. at 13, 16, 22, II Aplt. App. at 344 (Jackson aff.), we thing the record fully supports the city's regulation of sexually oriented businesses providing both on- and off-site viewing of sexually explicit materials.

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1. *See* I Aplt. App. at 158 (summary of Garden Grove, California land use study reviewing impact of adult businesses); id. at 161 (summary of Austin, texas land use study reviewing crime rates, property values, and trade area characteristics for areas surrounding adult bookstore, theater, and topless bar); id. at 162 (summary of Oklahoma City, Oklahoma study examining effect of adult bookstore on property values and crime); *id.* at 163 (summary of Indianapolie, Indiana study examining the effects of sexually oriented businesses on crime rates and property values in surrounding areas; report concludes that "even relatively . . . passive use[s] such as . . . adult bookstore[s] . . . have a serious negative effect on their immediate environs."); *id.* at 166 (summary of Minneapolis, Minnesota land use report concluding "concentrations of sexually oriented businesses have [a] significant relationship to higher crime and lower property values."); *id.* at 168 (summary of Whittier, California Study of effects of sexually oriented businesses, including two adult bookstores, on surrounding residential and commercial areas); *id.* at 169 (summary of Amarillo, Texas study of adult businesses, including "bookstores . . . with publications featuring nudity and explicit sexual activities," concluding that such businesses lead to increases in street crime).

Properly analyzed as a content-neutral regulation, Aurora's zoning ordinance survives constitutional scrutiny, and the city is entitled to relief, if the city can establish the ordinance is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication. *See Renton*, 475 U.S. at 45; *Rock Against Racism*, 491 U.S. at 791; *Clark*, 468 U.S. at 293. The district court, however, analyzed the ordinance under the test set out in *O'Brien*. 391 U.S. at 377. *O'Brien* provides that content-neutral regulations having an incidental impact of expressive conduct are constitutional if they further an important or substantial governmental interest and restrict First Amendment freedoms no greater than essential to further the interest. *See id.* We need not choose between the two tests, however, because the O'Brien analysis "is, in the last analysis, . . . little, if any, different from the standard applied to time, place or manner restrictions." *Clark*, 468 U.S. at 298. Review of the record and the legal principles which govern the city's claims indicates that the city prevails under either standard.

Z.J. Gifts does not in any real sense question the substantiality of Aurora's interests in preventing crime and disease, protecting property values, and preserving the quality of life of the city's residents. Indeed, the district court recognized that the city had demonstrated "the legitimacy of its concern" regarding adult uses which provide on-site adult entertainment, but not to those which provide adult materials for off-site consumption. *See Z.J. Gifts*, 932 F. Supp. at 1257-58. As noted earlier, this distinction is constitutionally irrelevant in determining whether Aurora's interests are important or substantial, particularly in light of the Court's strong statements regarding the government's interest in regulating such businesses in *Young* and *Renton*. Our analysis of Aurora's interest in

regulating sexually oriented businesses thus remains unaffected by the district court's distinction between off-site and on-site viewing of sexually explicit materials.

To the extent Z.J. Gifts argues that the city has not "demonstrate[d] that the recited harms are real, not merely conjectural," *Turner,* 512 U.S. at 664, we disagree. Aurora need not wait for sexually oriented businesses to locate within its boundaries, depress property values, increase crime, and spread sexually transmitted diseases before it regulates those businesses. It may rely on the experience of other cities to determine whether the harms presented by sexually oriented businesses are real and should be regulated. *See Renton,* 475 U.S. at 51-52. In other words, the city may control a perceived risk through regulation. The Court has long held, and we agree, that Aurora's stated governmental interests in circumscribing the adverse secondary effects of sexually oriented businesses "must be accorded high respect." Renton, 475 U.S. at 50 (quoting *Young,* 427 U.S. at 71); *ILQ Investments,* 25 F.3d at 1416.

Similarly, Z.J. Gifts cannot dispute that Aurora's ordinance allows for reasonable alternative avenues of communication. Sexually oriented businesses may locate within the city's industrial zones, which comprise approximately 10.9 percent of the city's area. *See* I Aplt. App. at 120. Approximately 3,200 acres of this land — fully 3.6 percent of the city's total area — are located near existing water and sewer services. *See id.* Thus, Z.J. Gifts is left with more land on which to relocate than was found to be adequate in *Renton* and its progeny. See *e.g., Renton,* 475 U.S. at 53 (five percent of city's land "in all stages of development from raw land to developed, industrial, warehouse, office and shopping space" available); *S&G News, Inc. v. City of Southgate,* 638 F. Supp. 1060, 1066 (E.D. Mich.

1986), *aff'd* 819 F.2d 1142 (6th Cir. 1987) (2.3 percent of city's land available); *Lakeland Lounge of Jackson, Inc. v. City of Jackson*, 973 F.2d 1255, 1260, 1262-63 (5th Cir. 1992) (majority opinion and Politz, C.J., dissenting), *cert. denied* 507 U.S. 1030 (1993) (1.2 percent of city's land available).

Z.J. Gifts' only remaining argument is that Aurora's zoning provision is not narrowly tailored to further the interests asserted. *See Renton*, 475 U.S. at 52-53; *O'Brien*, 391 U.S. at 377. The district court held that Aurora had "far less restrictive means of achieving [its] purpose with respect to a business like Christie's [which provides only off-site viewing of adult materials] than [a] zoning provision that would require it to relocate . . ." *Z.J. Gifts*, 932 F. Supp. at 1260. We believe the district court construed the narrow tailoring inquiry too narrowly, and held Aurora to a far more stringent standard than required by *Renton* and *O'Brien*.

The district court derived its "least restrictive means" language from *O'Brien*, which stated that an incidental restriction on free speech should be "no greater than is essential to the furtherance of [the] interest." *O'Brien*, 391 U.S. at 377. In recent cases, however, the Court elaborated on *O'Brien*, explicitly holding that time, place or manner regulations on protected speech must be narrowly tailored, but "need not be the least restrictive or least intrusive means of doing so." *Rock Against Racism*, 491 U.S. at 798. Instead, "[s]o long as the means chosen are not substantially broader than necessary," an ordinance is narrowly tailored if the regulation "promotes a substantial governmental interest that would be achieved less effectively absent the regulation." *Id.* at 799, 800; *see ILQ Investments*, 25 F.3d at 1417-18.

This reading of *O'Brien's* narrow tailoring inquiry harmonizes with that crafted by the Court in *Renton*. In regulating the harmful effects of sexually oriented businesses, the city need not address all the potential problems created by adult businesses at once. *See Renton*, 475 U.S. at 52-53. Nor is it limited to one method of regulation over another in attempting to curb harmful secondary effects. *See id.* at 53 ("Cities may regulate adult theaters by dispersing them . . . or by effectively concentrating them."). Instead, *Renton's* constitutional framework grants the city broad discretion to choose the means and scope of its regulation of sexually oriented businesses.

The Court's interpretation of the narrow tailoring prong in time, place and manner analyses recognizes the judiciary's limited role in reviewing content-neutral limitations on speech. "It is not [the court's] function to appraise the wisdom of [the city's] decision[.]" *Renton*, 475 U.S. at 53 (citing *Young*, 427 U.S. at 71). Instead, because legislative bodies are entitled to "reasonable inferences" suggested by the legislative record before them, *see Turner*, 512 U.S. at 666, the court simply determines whether the ordinance, as promulgated, "affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects" the city seeks to regulate. *ILQ Investments*, 25 F.3d at 1418. If so, the court's review is complete, and it may not substitute its own judgment for that of the legislature, usurping the legislative body's policy-making function. Where the legislative record validates the legislature's judgment, our obligation to exercise independent judgment "is not a license to . . . replace [legislative] factual predictions with our own." *Turner*, 512 U.S. at 666. Courts must allow cities like Aurora "reasonable opportunity to *experiment* with solutions to admittedly serious problems" *Young*, 427 U.S. at 71 (emphasis added).

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In invalidating Aurora's reasonable legislative choices, the district court exceeded the limits imposed by *Renton* and *O'Brien*. Unlike other zoning provisions held unconstitutional, Aurora's ordinance does not attempt to regulate businesses which have a minimal or nonexistent connection to sexually oriented entertainment. *See e.g., Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 74-77 (1981) (invalidating ordinance prohibiting all live entertainment within city's limits); *Faraone v. City of East Providence*, 935 F.Supp. 82, 88-89 (D.R.I. 1996) (granting preliminary injunction against enforcement of ordinance prohibiting rental of "adult oriented x-rated" videotapes on holidays and Sundays by businesses having only ten percent x-rated or adult oriented videos in total video rental inventory); *World Wide Video v. City of Tukwila*, 816 P.2d 18, 21 (Wash. 1991) (en banc), *cert. denied*, 503 U.S. 986 (1992) (invalidating ordinance regulating sexually oriented businesses, defined to include businesses with ten percent or more of their stock in trade consisting of sexually oriented merchandise). Nor does the city seek to justify its actions with a completely barren legislative record. *See, e.g., Discotheque Inc. v. City Council of Augusta*, 449 S.E.2d 608, 609-10 (Ga.1994) (summary judgment improper in favor of City where City produced no probative evidence of experience of other municipalities regarding negative secondary effects of sexually oriented businesses); *Quetgles v. City of Columbus*, 450 S.E.2d 677, 678 (Ga.1994), *cert. denied*, 514 U.S. 1083 (1995) (same). Instead, Christie's, and businesses like it, are indisputably sexually oriented businesses — specifically, "adult bookstores" as defined by the ordinance. *See* Aurora Mun. Code § 32.5-2 (adult bookstore means "a commercial establishment which devotes a significant or substantial portion of its stock-in-trade . . . to the sale, rental or viewing . . . of books, magazines, periodicals, . . . films, motion pictures, video cassettes, . . . or

other visual representations . . . of 'specified sexual activities' or 'specified anatomical areas.' "); I Aplt. App. at 263-75 (Inventory list for Christie's); *id.* at 119 (Anderson aff.). The legislative record before the city fully supported the city's concerns regarding the negative secondary effects caused by sexually oriented businesses, such as decreased property values and increased crime, which were precisely the problems Aurora sought to regulate by enacting the ordinance. *See* I Aplt. App. 124-26 (Preamble to Aurora Mun. Code § 32.5). In short, even if, as Z.J. Gifts claims, Christie's is "a new type of adult business, it may not avoid time, place and manner regulation that has been justified by studies of the secondary effects of reasonably similar businesses." *ILQ Investments,* 25 F.3d at 1418 (footnote omitted).

On this record, Aurora's ordinance satisfies *Renton* and *O'Brien*, as it promotes the city's well-established interest in regulating harmful secondary effects caused by sexually oriented businesses reasonably similar to those studied by other municipalities without unnecessarily regulating dissimilar businesses. We accordingly REVERSE the district court's judgment. On REMAND, the district court shall vacate its judgment and conduct further proceedings consistent with this opinion.

APPENDIX B — MEMORANDUM OPINION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED JULY 23, 1996

Z.J. GIFTS D-2, L.L.C., d/b/a Christie's, an Oklahoma Limited Partnership, Plaintiff,

v.

The CITY OF AURORA, an Incorporated Municipality, Defendant.

Civil Action No. 93-M-2310.

United States District Court, D. Colorado

July 23, 1996

* * *

MEMORANDUM OPINION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

MATSCH, Chief Judge.

The plaintiff is an Oklahoma limited partnership, doing business as Christie's at a leased site in the Granada Park Shopping Center located in a B-2 commercial retail zone district in the City of Aurora, Colorado ("Aurora"). That business has been operating since October 30, 1993. It sells and rents video tapes of sexually explicit conduct and also sells lingerie, magazines with sexually

explicit content, and sexually oriented novelties. All of these items are for off-site use.

On December 13, 1993, Aurora adopted an ordinance, effective January 21, 1994, codified as Chapter 32.5 of the Aurora Municipal Code ("the Ordinance"). The Ordinance prohibits anyone from operating a "sexually oriented business" without a valid sexually oriented business license issued by the city. § 32.5-21(A). It confines these businesses to industrial zone districts. § 32.5-52(A). The Ordinance is a comprehensive one that requires background investigations of license applicants and managers, limits the location of the businesses relative to one another, sets certain requirements for the interior physical arrangement of business premises, and regulates the acts permitted at each site. The Ordinance describes a sexually oriented business as

> an adult arcade, adult bookstore, adult novelty shop, adult video store, adult cabaret, adult motion picture theater, adult theater, or nude model studio.

§ 32.5-2.

Aurora enacted the Ordinance to minimize and control the adverse effects associated with such business including reduction in property values, spread of sexually transmitted diseases, and crime. It conducted a review of research on sexually oriented businesses and specifically found that prostitution, pandering, child pornography, possession and distribution of obscene material, possession and sale of controlled substances, and violent crimes against persons and property were aggravated by these businesses.

The plaintiff's second amended complaint filed February 10, 1993, challenges the constitutionality of the Ordinance under the

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United States Constitution and the constitution of the State of Colorado. Aurora counterclaimed to enjoin the conduct of the plaintiff's business as being in violation of the requirements of the Ordinance. Both parties filed cross motions for summary judgment with extensive briefs and exhibits. Oral argument was heard on March 28, 1996.

Although the plaintiff has raised multiple questions regarding the validity of the Ordinance, the pivotal issue is whether the application of the zoning restriction of that Ordinance to the plaintiff's business constitutes an abridgement of Christie's freedom of speech under the First Amendment made applicable by the Fourteenth Amendment to the United States Constitution. At oral argument, the court narrowed the focus of the inquiry to whether the restrictions imposed by the Ordinance that would require Christie's to relocate in an industrial zone district serve a legitimate governmental purpose. In this case, Aurora has shown that it adopted the subject Ordinance only after careful consideration of the results of a number of studies of the secondary adverse effects of sexually oriented businesses in other cities and after public hearing before the Aurora City Council.

The defendant has demonstrated the legitimacy of its concern for the need to mitigate crime and public health risks shown to be associated with such adult entertainment as erotic dancing, sexually explicit movie theaters and adult book stores with peep show facilities. Christie's is different because there is no such entertainment on its premises. Aurora also seeks to justify the Ordinance as required to protect property values, and it cites studies from other municipalities tending to support the loss of values when there are sexually oriented businesses in the neighborhood.

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The distinction which is of interest here was made by the district court in *ILQ Investments, Inc. v. City of Rochester*, 816 F.Supp. 516 (D.Minn.1993). There the court granted a preliminary injunction restraining enforcement of a similar ordinance against a similar business, although it appears that the bookstore had more of a mix in that only about forty percent of the store floor space was devoted to sexually explicit material. The district court found that none of the studies relied upon by the city of Rochester included the type of business operated by that plaintiff. The district court was reversed by the Eighth Circuit Court of Appeals in *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir.1994). The appellate court found adequate support for secondary effects from a study in Indianapolis and another in St. Paul. The Indianapolis study appears to be the same or similar to one of the studies relied upon by Aurora. It included the opinions from a survey of real estate appraisers concerning the reduction in value of residential property with the conclusion that "the best professional judgement available indicates overwhelmingly that adult entertainment businesses — even a relatively passive use such as an adult bookstore — have a serious negative effect on their immediate environs." Exhibit A, p. 51, Defendant's Brief in Support of Motion for Summary Judgment. The Eighth Circuit opined that Rochester need not prove that the subject bookstore would have the exact same adverse effects as the adult businesses studied by other cities so long as the city reasonably believed the evidence was relevant and said "[e]ven if Downtown Book and Video is a new type of adult business, it may not avoid time, place, and manner regulation that has been justified by studies of the secondary effects of reasonably similar businesses." 25 F.3d at 1418. Respectfully, this analysis is flawed in that it is directed more toward the subjective intent of the city council that the objective effects on the freedom to communicate.

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In the many cases which have addressed the problem of sexually oriented businesses and the efforts of communities to restrict them, the analyses undertaken have followed a pattern of repeating the litany from the Supreme Court in *City of Renton v. Playtime Theatres Inc.*, 475 U.S. 41, 49-50, 106 S.Ct. 925, 929-30, 89 L.Ed.2d 29 (1986) and other cases that such ordinances are content neutral because they are not designed to suppress the content of the speech — only the secondary adverse effects of sexually oriented business on the neighborhood. There can be no quarrel with that approach in those cases where those effects are well documented in the types of studies which were used by Aurora in considering this Ordinance. If the plaintiff had booths for peep shows on its premises, the issues in this case would then deal with some of the particular restrictions which may be more than necessary to meet the governmental purpose of avoiding or mitigating those secondary effects. The problem here is that none of the material relied on by the city council shows that the business of Christie's bears any relationship to such effects.

Indeed, in the matter of any increased in crime, the evidence is distinctly to the contrary. Deputy Police Chief Michael Stiers told the city council that Christie's had business establishments in Oklahoma City and that there were no reports of crime from them. He also said that there was such a business in Denver, and there were no reports of crime from it. Exhibit D, pp. 13-15, Plaintiff's Brief in Support of Cross-Motion for Summary Judgment. The studies concerning real estate values are nonpersuasive. They seem to be little more than opinions of real estate appraisers based on hypotheticals, and there does not seem to be any distinction made between the type of adult book stores with peep show facilities and those that are engaged solely in the sale or lease of sexually oriented materials for use elsewhere. Aurora presented no evidence that Christie's presence in the

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Granada Park Shopping Center had reduced the value of the surrounding commercial properties or of any property in nearby residential zone districts, despite the fact that Christie's had been in business at that location for almost two and a half years at the time of oral argument on the summary judgment motions.

In *Ward v. Rock Against Racism* the Supreme Court said this:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. . . . A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. . . . Government regulation of expressive activity is content neutral *so long as it is justified without reference to the content of the regulated speech.*

491 U.S. 781, 791, 109 S.Ct. 2745, 2754, 105 L.Ed.2d 661 (1989) (citations omitted, emphasis added).

If the plaintiff's business is sufficiently dissimilar to the types of businesses associated with the undesirable secondary effects that are of legitimate governmental concern as shown in the studies relied upon by the defendant, then the application of the ordinance to the Christie's store as sought by the defendant in the counterclaim is directed not at crime, public health, or property values. Instead, it seeks to suppress the sexual messages in the

store's inventory. In sum, the only significant difference shown between the business of Christie's and the other retail businesses in this zone district is that Christie's sells explicit communications about sexual activity. Thus, it can be justified only by reference to the sexual content of the plaintiff's business.

There is an obvious difference between a package liquor store and a bar, and those differences are noted in liquor licensing requirements. *See,* C.R.S. § 12-47-101, et seq. There is also a qualitative as well as quantitative distinction between sports arenas and sporting goods stores. It is difficult to believe that anyone would suggest that sporting goods stores must be limited to the same zoning areas for sports arenas based on the rise in crime or reduction in residential property values associated with sports arenas. There are simply not similarly situated businesses.

The Supreme Court has repeatedly recognized that non-obscene sexual speech is protected by the First Amendment as are many other types of expression considered indecent and disreputable by many. Protective paternalism to exclude such material is not a legitimate function of government even where there is a regulatory authority such as the FCC. *Denver Area Educational Telecommunications Consortium Inc., et al. v. Federal Communications Comm'n,* __ U.S. __, 116, S.Ct. 2374, 135 L.Ed.2d 888 (1996). Although the Court has not yet determined what standard of review is appropriate for government regulation of non-obscene, indecent material, it seems clear at the very least that heightened (intermediate) scrutiny is demanded, even if the regulation is "content-neutral" and imposes only an incidental burden on speech. *Id* at __ __ __, 116 S.Ct. at 2390-93; *Turner Broadcasting System, Inc. v. Federal Communications Comm'n,* __ U.S. __, __, 114 S.Ct. 2445, 2469, 129 L.Ed.2d 497 (1994). The Court described intermediate

scrutiny under the First Amendment in *United States v. O'Brien*. A regulation restricting speech will be sustained if:

> it furthers an important or substantial government interest; if the governmental interest in unrelated to the suppression of free expression; and if the incidental *restriction* on alleged First Amendment freedoms *is no greater than is essential* to the furtherance of that interest.

391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968) (emphasis added).

In *Telecommunications Consortium* the Court invalidated § 10(b) of the Cable Television Consumer Protection and Competition Act of 1992. Enacted for the purpose of protecting children from "patently offensive" sexual programming, that section requires cable system operators to restrict speech by segregating and blocking "patently offensive" sexual content appearing on leased channels. According to its provisions, sexually "indecent" material is required to be placed on a separate channel that would be blocked until a 30 day advanced written notice to unblock the channel is received from a subscriber. Likewise, the channel must be reblocked within 30 days of a subscriber's request. The Court noted that these block and segregate procedures were not required on unleased channels. Instead, cable operators are required to block or scramble programming on *any* unleased channel that a subscriber does not wish to receive, and "indecent" programming need not be segregated on a separate channel at all. No significant advanced notice is required to block or unblock programs. The Court also recognized the advent of the "V-chip" which automatically identifies and blocks sexually explicit or violent programs

according to the wishes of a subscriber. The availability of these less restrictive means of accomplishing the government's legitimate purpose was persuasive evidence that § 10(b)'s restrictions on speech are not "a narrowly, or reasonably tailored effort to protect children. Rather, they are overly restrictive 'sacrific[ing]' important First Amendment interests for too 'speculative a gain.' " __ U.S. __ at __, 116 S.Ct. at 2394 (quoting *Columbia Broadcasting System Inc. v. Democratic National Comm.*, 412 U.S. 94, 127, 93 S.Ct. 2080, 2098-99, 36 L.Ed.2d 772 (1973)).

Two aspects of *Telecommunications Consortium* are significant here. The first is that it involved broadcasting which enjoys the least First Amendment protection of all forms of communication. *Federal Communications Comm'n v. Pacifica Foundation*, 438 U.S. 726, 748, 98 S.Ct. 3026, 3039-40, 57 L.Ed.2d 1073 (1978). The second is that the governmental interest was substantial and unquestioned, to wit: the protection of children from "patently offensive" material as measured by contemporary community standards. Nevertheless, the Court invalidated a provision restricting access to "indecent" materials that was broader than necessary to achieve the governmental purpose.

Aurora's ordinance, although content neutral as applied to those businesses providing sexual entertainment on their premises becomes content-discriminatory as applied to a business such as Christie's which offers sexual material only for off-premises consumption. The access to non-obscene, "indecent" material through purchase and rental for home consumption must receive at least as much First Amendment protection as broadcasting. The differences between the business of selling and renting sexual materials for home use only and providing sexual entertainment

on business premises as great as those between providing sexual entertainment or business premises and cable television broadcasting. The problems well documented in studies of adult businesses providing sexual entertainment on business premises can no more be generalized to a business like Christie's than they can be to the cable television industry.

There are far less restrictive means of achieving Aurora's purpose with respect to a business like Christie's than the zoning provision that would require it to relocate to an industrial district. Aurora can prohibit the display of "indecent" materials in storefront windows and the sale or rental of such materials to minors. As applied to Christie's Aurora ordinance burdens more speech than is necessary. It is "overly restrictive sacrificing important First Amendment interests for too speculative a gain."

Accordingly, it is

ORDERED that to the extent that the Ordinance requires relocation of the plaintiff's business, it is a violation of the plaintiff's freedom of expression protected by the First and Fourteenth Amendments to the United States Constitution. It is

FURTHER ORDERED that a conference will be held on August 15, 1996, at 1:30 p.m. in the Conference Room, Second Floor, the Byron White United States Courthouse, 18th and Stout Streets, Denver, Colorado, to discuss the remaining issues in this civil action.

APPENDIX C — ORDER FOR ENTRY OF FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO FILED SEPTEMBER 2, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 93-M-2310

Z.J. GIFTS D-2, L.L.C., d/b/a CHRISTIE'S, an Oklahoma Limited Partnership,

Plaintiff,

v.

THE CITY OF AURORA, an incorporated municipality,

Defendant.

ORDER FOR ENTRY OF FINAL JUDGMENT

On July 23, 1996, this Court entered a Memorandum Opinion and Order on the cross-motions for summary judgment. In that Order, the Court found that Aurora Municipal Code, Chapter 32.5, is unconstitutional as applied to Plaintiffs existing business, which does not involve on-premises entertainment. The Court then directed a status conference to be convened for further proceedings. That status conference was held on August 15, 1996, and it was agreed that counsel would have 40 days to stipulate to an entry of final judgment and attorneys' fees. The Court and parties further agreed that Plaintiffs remaining claims are moot based upon the Court's previous Order. On September 24, 1996, the parties filed said stipulation. Upon the foregoing, it is now

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ORDERED that the Clerk will enter final judgment declaring that Aurora Municipal Code, Chapter 32.5, is unconstitutional as applied to Plaintiff's existing business, which does not involve on-premises entertainment, that Defendant is enjoined from enforcing Aurora Municipal Code, Chapter 32.5, against the Plaintiffs existing business, and that Plaintiffs remaining claims for relief are moot. The Court has also determined that the parties have stipulated that, in the event Defendant does not appeal this decision, Plaintiff shall have and recover from the Defendant the amount of $30,000 for attorneys' fees and costs. Should the Defendant exercise its right to appeal, then the parties are free to seek any attorneys' fees and costs available pursuant to 42 U.S.C. § 1988.

DATED: This 27th day of September, 1996.

BY THE COURT:

s/ Richard P. Matsch
Richard P. Matsch, Chief Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED MARCH 31, 1998

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 96-1483

Z.J. GIFTS D-2, L.L.C., doing business as Christie's, an Oklahoma limited partnership,

Plaintiff - Appellee,

v.

CITY OF AURORA, an Incorporated Municipality,

Defendant - Appellant.

ORDER

Filed March 31, 1998

Before, **ANDERSON, KELLY,** and **HENRY,** Circuit Judges.

Appellee's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: s/ [illegible]
Deputy Clerk

APPENDIX E — AURORA MUNICIPAL CODE, CHAPTER 32.5

Chapter 32.5

SEXUALLY ORIENTED BUSINESSES

ARTICLE I. IN GENERAL

Sec., 32.5-1. Purpose and intent.

The purpose and intent of this chapter is to regulate sexually oriented businesses to promote the health, safety, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the deleterious location and concentration of sexually oriented businesses within the city, thereby reducing or eliminating the adverse secondary effects from such sexually oriented businesses. The provisions of this chapter are not intended to impose a limitation or restriction on the content of any communicative materials, including sexually oriented materials. It is not the intent of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment or the Colorado Constitution, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of this chapter to condone or legitimize the distribution of obscene material.
(Ord. No. 93-117, § 1, 12-13-93)

Sec. 32.5-2. Definitions.

Words and phrases used in this chapter shall have the following meanings ascribed to them:

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Adult arcade means any commercial establishment where, for any form of consideration, monetary or otherwise, one or more still or motion picture projectors, slide projectors, video cassette players, or similar machines, or other image producing machines, for viewing by five (5) or fewer persons each, are used to show films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

Adult bookstore, adult novelty store, or *adult video store* means a commercial establishment which devotes a significant or substantial portion of its stock-in-trade or interior floor space to the sale, rental or viewing (for any form of consideration) of books, magazines, periodicals, or other printed matter, or photographs, films, motion pictures, video cassettes, slides, or other visual representations which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

Adult cabaret means a "cabaret" as defined in section 5-49 of this Code which features:

(1) Persons who appear nude or in a state of nudity or seminudity; or

(2) Live performances which are characterized by the exposure of "specified anatomical areas."

Adult motion picture theater means a commercial establishment which is distinguished or characterized by showing of films, motion pictures, video cassettes, slides, or similar photographic reproductions with an emphasis on depicting or

describing "specified sexual activities" or "specified anatomical areas" which are regularly shown for any form of consideration.

Adult theater means a theater, concert hall, auditorium, or similar commercial establishment which, for any form of consideration, regularly features persons who appear in a state of nudity or live performances which are characterized by an emphasis on exposure of "specified anatomical areas" or by "specified sexual activities."

Employee means a person who works or performs in and/or for a sexually oriented business, regardless of whether or not said person is paid a salary, wage, or other compensation by the operator of said business.

Establishment of a sexually oriented business means and includes any of the following:

(1) The opening or commencement of any such business as a new business;

(2) The conversion of an existing business into a sexually oriented business;

(3) The addition of a different sexually oriented business to any other existing sexually oriented business; or

(4) The relocation of a sexually oriented business.

Industrial district shall have the meaning set forth in Article XI of Chapter 41 of this Code.

Licensing officer means the director of finance or his or her designee.

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Manager means an operator, other than a licensee, who is employed by a sexually oriented business to act as a manager or supervisor of employees or is otherwise responsible for the operation of the business.

Nudity or *state* of *nudity* means:

(1) The appearance of human bare buttock, anus, male genitals, female genitals, or the areola or nipple of the female breast; or

(2) A state of dress which fails to opaquely and fully cover human buttocks, anus, male or female genitals, pubic region, or areola or nipple of the female breast.

Nude model studio means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided for money or any form of consideration to be observed, sketched, drawn, painted, sculpted, photographed, or similarly depicted by other persons.

Operator means and includes the owner, license holder, custodian, manager, operator, or person in charge of any permitted or licensed premises.

Peep booth means a viewing room of less than one hundred fifty (150) square feet of floor space.

Licensee means a person in whose name a license to operate a sexually oriented business has been issued, as well as the individual listed as an applicant on the application for a license.

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Person means an individual, proprietorship, partnership, corporation, limited liability company, association, or other legal entity.

Premises or *licensed premises* means any premises that, requires a license and that is classified as a sexually oriented business, including parking lots and sidewalks immediately adjacent to the structure containing the sexually oriented business.

Principal owner means any person owning, directly or beneficially:

(1) Ten (10) per cent or more of a corporation's equity securities;

(2) Ten (10) per cent or more of the membership interests in a limited liability company; or

(3) In the case of any other legal entity, ten (10) per cent or more of the ownership interests in the entity.

Public park shall have the meaning set forth in section 29-33 of the Code.

Residential district shall mean any area depicted on the Aurora Zoning Map as a residential land use.

Sexually oriented business means an adult arcade, adult bookstore, adult novelty shop, adult video store, adult cabaret, adult motion picture theater, adult theater, or nude model studio. The definition of sexually oriented business shall not include an establishment where a medical practitioner, psychologist, psychiatrist, or similar professional person licensed by the state engages in medically approved and recognized sexual therapy.

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Seminude or *seminudity* means a state of dress in which clothing covers no more than the genitals, pubic region, and areolae of the female breasts, as well as portions of the body covered by supporting straps or devices.

Specified anatomical areas as used herein means and includes any of the following:

(1) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus, or female breasts below a point immediately above the top of the areolae; or

(2) Human male genitals in a discernibly turgid state even if completely and opaquely covered.

Specified criminal acts means sexual crimes against children, sexual abuse, sexual assault, or crimes connected with another sexually oriented business including, but not limited to distribution of obscenity, prostitution, or pandering.

Specified sexual activities means and includes any of the following:

(1) The fondling or other intentional touching of human genitals, pubic region, buttocks, anus, or female breasts;

(2) Sex acts, normal or perverted, actual or simulated including intercourse, oral copulation, or sodomy;

(3) Masturbation, actual or simulated;

(4) Human genitals in a state of sexual stimulation, arousal, or tumescence; or

(5) Excretory functions as part of or in connection with any of the activities set forth in subsections (1) through (4) of this definition.

Transfer of ownership or control of *a sexually oriented business* means and includes any of the following-

(1) The sale, lease, or sublease of the business;

(2) The transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or similar means; or

(3) The establishment of a trust, management arrangement, gift, or other similar legal devise which transfers ownership or control of the business, except for transfer by bequest or other operation of law upon the death of a person possessing the ownership or control.

(Ord. No. 93-117, § 1, 12-13-93)

Sec. 32.5-52. Location of sexually oriented businesses.

(a) No license shall be issued under this chapter for any sexually oriented business within any zone district other than industrial zones.

(b) It shall be unlawful to operate or cause to be operated a sexually oriented business outside of an industrial zone.

(c) It shall be unlawful to operate or cause to be operated a sexually oriented business within one thousand five hundred (1,500) feet of:

(1) Any church;

(2) Any school meeting all requirements of the compulsory education laws of the state;

(3) The boundary of any residential district;

(4) An existing dwelling unit (single or multiple); or

(5) A public park adjacent to any residential district.

(d) It shall be unlawful to operate or cause to be operated a sexually oriented business within one thousand five hundred (1,500) feet of another sexually oriented business.

(e) It shall be unlawful to cause, or permit the operation, establishment, or maintenance of more than one (1) sexually oriented business within the same building, structure, or portion thereof.
(Ord. No. 93-117, § 1, 12-13-93)

Sec. 32.5-53. Measurement of distance.

(a) For purposes of this article, distance between any two (2) sexually oriented businesses shall be measured in a straight line, without regard to intervening structures, from the closest exterior structural wall of each business.

(b) For purposes of this article, distance between any sexually oriented business and any church, school, public park, dwelling unit (single or multiple), or residential district shall be measured in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as part of the premises where the sexually oriented business is conducted to the nearest property line of the premises of a church, school, or dwelling unit (single or multiple), or the nearest boundary of an affected public park or residential district.
(Ord. No. 93-117, § 1, 12-13-93)

See. 32.5-54. Other locational regulations.

(a) Any sexually oriented business lawfully operating on the effective date of the ordinance [Ordinance No. 93-117], that is in violation of section 32.5-52 will be permitted to continue for a period of six (6) months from the effective date hereof.

(b) Notwithstanding the provisions of subsection (a), the licensing officer may grant an extension of time during which a sexually oriented business in violation of section 32.5-52 will be permitted to continue upon a showing that the owner of the business has not had a reasonable time to recover the initial financial investment in the business. No such extension of time shall be for a period greater than that reasonably necessary for the owner of the business to recover his or her initial financial investment in the business. A sexually oriented business in violation of section 32.5-52 may continue during such extended period unless the business is sooner terminated for any reason or voluntarily discontinued for a period of thirty (30) days or more. Such business shall not be enlarged, extended, or altered except that the business may be brought into compliance with this chapter.

(c) If two (2) or more sexually oriented businesses are within one thousand five hundred (1,500) feet of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at the particular location will be deemed to be in compliance with section 32.5-52 and the later established business(es) will be deemed to be in violation of section 32.5-52.

(d) A sexually oriented business lawfully operating is not rendered in violation of section 32.5-52 by the location, subsequent to the grant or renewal of a sexually oriented business permit and/or license, of a church, school, dwelling unit (single or multiple), public park, or residential district within one thousand five hundred (1,500) feet of the sexually oriented business. This provision applies only to the renewal of a valid permit and/or license and does not apply when an application for a permit and/or license is submitted after a permit and/or license has expired or has been revoked.
(Ord. No. 93-117, § 1, 12-13-93)